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In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

TRADERS AND GENERAL INSURANCE COMPANY,
a corporation,
Appellant,

VERSUS

A. N. EDWARDS and H. E. TURPIN,
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Traders and General Insurance Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on the 4th day of November, 1954.

OPINION BELOW

The United States District Court for the Northern District of Oklahoma handed down its opinion on the 9th day of April, 1954, Appendix "A" hereto. The opinion of

the United States Court of Appeals for the Tenth Circuit was handed down on the 4th day of November, 1954, Appendix "B" hereto (not yet officially reported).

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1954 (Appendix "B," *infra).* A petition for rehearing was filed on the 24th day of November, 1954, and was denied on the 9th day of December, 1954. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals departed from accepted and usual course of judicial proceedings in affirming the judgment of the trial court which had required the defendant to assume an obligation which is specifically excluded from its Contract of Insurance.

2. Whether the Court of Appeals departed from accepted and usual course of judicial proceedings in affirming the judgment of the trial court which had failed to consider the significant meaning of the words, "property used by, or rented to the insured," and the words, "property in the care, custody, or control of the insured," as these words are used in the science of Casualty Insurance Underwriting.

STATEMENT

A. N. Edwards Construction Company carried a public liability and property damage insurance policy with

Traders and General Insurance Company which contained the following exclusion:

"EXCLUSIONS.

"This policy does not apply:

* * * * * * * *

"(g) under Coverage D, to injury to or destruction of (1) property owned, occupied or used by or rented to the Insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the Insured, * * *."

Edwards engaged H. E. Turpin to drill an oil and gas well on a lease owned by Edwards. While the well was being drilled, the drilling equipment was damaged by fire. Turpin brought suit against Edwards for damage to the equipment alleging that Edwards' negligence had caused the damage. Edwards called on appellant, Traders and General Insurance Company, to defend the action and pay any judgment which might result. Traders and General Insurance Company refused on the ground that the property was excluded under Exclusion (g) of the policy as set forth above. Edwards brought suit in the Northern District of Oklahoma for declaratory judgment. H. E. Turpin intervened alleging coverage. Edwards contended that the well was being drilled by H. E. Turpin as an independent contractor and that the drilling rig and equipment were being used by him and were under his control. Traders and General Insurance Company contended that Turpin was not an independent contractor but that even if he were, the property was still being "used by" the assured Edwards or was

under his control within the meaning of the insurance contract.

The District Court held that Turpin was an independent contractor and that the property was not being used by and was not under the control of Edwards.

The case was appealed to the Circuit Court and on November 4, 1954, such court held that Turpin was an independent contractor and that the insurance contract covered. However, the court did not pass on the other and fundamental questions as to the meaning of the words "used by" and under the "control of" as used in the insurance contract.

On the 24th day of November, 1954, a petition for rehearing was filed, and on the 9th day of December, 1954, the Circuit Court denied such petition by simply entering an order to such effect.

REASONS RELIED ON FOR THE WRIT OF CERTIORARI

1. In this case, the Circuit Court and the trial court have so far departed from the accepted and the usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

The question at bar in this case concerns the interpretation of a written contract. It is impossible to interpret any contract without giving full effect to all of its terms. Neither the Circuit Court nor the trial court in this case has attempted to ascertain and explain the meaning of the contract between the parties to this suit by giving full effect

to all of its terms. The decision of both courts has impaired the obligations of the contract which is the basis of this suit by plaintiff against the defendant. The defendant has been compelled to assume an obligation which is specifically excluded from its contract, and has been deprived of its legal rights by the mere failure of the courts to interpret a contract by giving full effect to all of its terms.

JURISDICTION OF COURT BELOW

The United States District Court for the Northern District of Oklahoma had jurisdiction of this case because the plaintiff, Edwards, was a resident of Oklahoma and the defendant, Traders and General Insurance Company, was a resident of the State of Texas, and more than $3,000.00 was involved. Plaintiff sought a declaratory judgment.

ARGUMENT

In this case, the Circuit Court did not pass upon the fundamental and controlling question, *i.e.*, the meaning of the wording of the insurance policy. Before passing upon the meaning of the words "used by" and "controlled by" the assured, careful thought should be given to all the terms of the policy and to the insurance business to determine what was intended by the policy and what the wording meant.

The casualty insurance business is divided into many species, such as, Owners, Landlords, and Tenant's Policies; Manufacturer's and Contractor's Policies; Garage Liability Policies; Automobile Policies, and many coverage agreements which may be added to these basic policy forms by

endorsement. Those who are engaged in the casualty insurance business must understand the insurance problems of those who are engaged in every kind of business. This business is one of the most complicated of modern industries. Any literate adult, however, can read an insurance policy. But the wisest of men cannot ascertain and explain the meaning of a liability insurance policy without being conversant with the exposition of things, and the facts, the problems, and the language of liability insurance underwriting.

There are in excess of six hundred business operations. Some business operations are carried on at the premises of the insured, some are carried on away from the insured's premises. Some insureds use both owned and non-owned automobiles, some use no automobiles. Some insureds have one or more elevators, some have no elevators. Some insureds use and rent property which belongs to other people, some insureds do not rent or use other people's property. Some insureds have property of other people in their care, custody and control, some insureds have no property of other people in their care, custody, and control.

Insurance underwriters must know how to classify, name, and value insurance hazards. These hazards are intangible things. Legal liability hazards arise out of the ownership, maintenance, or use of premises, vehicles, business operations, the sale of products, completed operations, hold harmless agreements, etc. Material damage hazards are caused by named perils, such as, fire, windstorm, hail, explosions, collisions, etc. The company's obligation to pay legal liability claims is dependent on the negligence of

the insured and the contributory negligence of the claimant. The company's obligation to pay material damage claims is contractual, and no insured would buy insurance for material damage hazards which required proof of his freedom from negligence.

There are many factors involved in the computation of premiums and rates of premium for the various kinds of risks, perils, and hazards. That is, rate making is a complicated statistical problem. In connection with many legal liability hazards the basis of premium, is the payroll, gross sales, admissions, receipts, costs, etc. In other words, there must be a logical relation between the basis of premium, the rate of premium, the premium, and the company's exposure.

In computing the rate of premium for material damage hazards it is necessary to know the kind, the value, the location, and the quantity of property owned by the insured. That is, the basis of premium for material damage hazards is separate and distinct from the basis of premium computation for legal liability hazards. The rate of premium is controlled by the elements of accident frequency, severity, etc. But the basis of premium for material damage hazards must consider the quality, the quantity, the location, the value, and the kind of property owned by an insured.

Property of other people which is occupied or used by or rented to the insured, or which is in the care, custody or control of an insured is exposed to exactly the same perils as property owned by the insured. Most insureds neither use nor rent, nor have property of others in their care,

custody, or control. It would be impossible for companies to know the quantity, the quality, the location, the value, or the kind of non-owned property which some particular insured might use, rent, occupy, or have in his care, custody, and control. All such property is therefore excluded from the basic form policy because the company would have no way of knowing how to compute a premium for such non-owned property,

In this case, the property destroyed was a drilling rig, and its equipment. Material damage hazards for drilling rigs are included in the coverage offered by an Inland Marine Policy. The premium for Inland Marine coverage on this one rig would have been more than four times the amount charged Edwards by the defendant for the coverage afforded by its policy. If material damage hazards for non-owned property were included in a general liability policy any particular insured might have one rig or one hundred rigs so rented or used. It would be impossible for any company to assume an unknown, or an unlimited liability without adequate premiums. If Turpin had had the kind of coverage that he needed for this rig, Edwards could have protected himself by having his name added to the Turpin policy for a small cost, or by obtaining some form of Bailee's policy. The defendant in this case, however, is not engaged in the Inland Marine Insurance Business.

In this case, the question of what is, and what is not an independent contract is an irrelevant thesis. Turpin contracted to drill the well to a specified depth. This contract between Edwards and Turpin had been completed. The only thing to be done at the job site was to bring in

the well. In the oil business, this operation is performed by the owner. Edwards was the owner. He needed a rig and its equipment to complete the job of bringing in the well. There was no contract which obligated Turpin to do this work. Turpin contracted to rent his rig and equipment to Edwards. Edwards agreed to rent the rig and its equipment from Turpin, and to pay Turpin $8.50 per hour for the use of his rig fully equipped and manned. This procedure is usual and customary in such operations. This rig was rented just the same as you would rent a car from a rental service. The obligation to deepen the well was that of Edwards, and not of Turpin. Turpin only contracted to rent the rig to Edwards at $8.50 per hour. Edwards had rented the rig. He was using it to accomplish the work that he needed to do in finishing the well. Edwards could not have deepened the well without using a rig. He owned no rig, and he rented the rig from Turpin. There was no contract whereby Turpin agreed to deepen the well. He agreed only to rent the rig to Edwards. Edwards was using the rented equipment to deepen the well, and the rig and the operations being performed at the job site were in the care, custody, and control of Edwards.

In conclusion, a cause of action is a right, a violation of that right, and resulting damages. In this suit, the only obligation which the defendant has or can have to plaintiff must be found in the contract between the parties. The contract provides that the policy does not apply to injury to or destruction of property—used by or rented to the insured, nor to property in the care, custody, or control of the insured. The rig that was destroyed by fire belonged to Turpin. It was rented to and used by Edwards. At the

time of the fire, this rented equipment was being used by Edwards and the rig, the well, all operations at the job site were in the care, the custody, or control of the insured. The defendant in this suit did not agree by its contract to indemnify Edwards for any liability which may be imposed on him as a result of the destruction of the rig and its equipment, and the defendant has been required to assume an obligation which is specifically excluded from its contract.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

REX H. HOLDEN,
Braniff Building,
Oklahoma City, Oklahoma,

Attorney for Petitioner, Traders and General Insurance Company.

Of Counsel:
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P. O. Box 6291,
Dallas, Texas;

MART BROWN,
1515 First National Building,
Oklahoma City, Oklahoma.

January, 1955.

APPENDIX

Appendix A

Opinion of the District Court

A. N. EDWARDS, and H. E. TURPIN,

v.

TRADERS AND GENERAL INSURANCE COMPANY, a corporation.

Civil No. 3372

Northern District of Oklahoma

Decree

The above entitled matter having come on for trial on the eighteenth day of March, 1954, and all parties appearing and having announced ready for trial, and the Court having heard the evidence and argument of counsel and being advised;

It is, therefore, ordered, adjudged and decreed by the Court that the defendant, Traders and General Insurance Company, be required to defend plaintiff, A. N. Edwards, in cause No. 26710 pending in the District Court of Okmulgee County, State of Oklahoma, wherein H. E. Turpin is plaintiff and plaintiff A. N. Edwards is defendant, and that the defendant, Traders and General Insurance Company, further shall pay any judgment rendered therein which does not exceed the policy limits of the policy herein concerned.

It is further ordered that the defendant, Traders and General Insurance Company, shall defend plaintiff and hold him harmless in connection with any other claims of liability made with respect to the loss or damage of the drilling rig and equipment belonging to H. E. Turpin on May 28, 1953, within the limits of the policy herein concerned.

[APPENDIX A]

It is further ordered that plaintiff shall recover the costs of this action from the defendant, Traders and General Insurance Company.

Dated this 9th day of April, 1954.

Royce H. Savage,

United States District Judge.

Filed April 9, 1954.

Appendix B

Opinion of the Court of Appeals, Filed United States Court of Appeals, Tenth Circuit, Nov. 4, 1954, Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
Tenth Circuit

September Term, 1954

TRADERS AND GENERAL INSURANCE COMPANY,
a corporation,

Appellant,

vs.

A. N. EDWARDS, and H. E. TURPIN,

Appellees.

Number 4931

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Mart Brown (Covington & Donovan were with him on the brief) for Appellant;

Jack N. Hays (G. Ellis Gable and Charles P. Gotwals, Jr., were with him on the brief) for Appellee, A. N. Edwards;

Hugh M. Sandlin for Appellee, H. E. Turpin.

Before BRATTON and HUXMAN, United States Circuit Judges, and RITTER, United States District Judge.

[APPENDIX B]

HUXMAN, Circuit Judge.

This was a declaratory judgment action under the Declaratory Judgment Act, 28 U. S. C. A. § 2201, brought by appellee, A. N. Edwards, against appellant, Traders and General Insurance Company, for a declaratory judgment adjudicating that the insurance company was obliged to defend on behalf of Edwards an action instituted against him by H. E. Turpin in the District Court of Okmulgee County, Oklahoma. The insurance company has appealed from a judgment requiring it to defend that action and to hold Edwards harmless from any liability established against him therein. H. E. Turpin intervened in the action. He is aligned in interest with appellee Edwards.

The appellant insurance company had issued to A. N. Edwards and/or A. N. Edwards Construction Company a comprehensive general liability policy which was in force at the time of the occurrence out of which this litigation arose. The insurance policy contained an insurance clause covering Edwards' liability for property damage arising in connection with his operations.

The Edwards Construction Company owned an oil and gas lease on which an oil well was being drilled. The well had been drilled to a point where it was approaching the oil sand. At this point, the company drilling the well suspended its operations and the Edwards Company, through A. N. Edwards, made an oral contract with H. E. Turpin to drill in or complete the well. This contract was what is known as a contract for day work or rig-time work. Turpin was to perform the operation of drilling into the pay sand. He was to be paid at the rate of $8.50 per hour. He furnished his own rig, employees and supervision. During these operations, the rig was damaged by fire. Turpin sued Edwards and the A. N. Edwards Construction Company, alleging that their negligence caused the dam-

age to the rig. Edwards demanded the insurance company defend the action and hold him free from liability. Upon refusal by the company to respond, this action was instituted.

It is the company's position that there is no liability under the policy because of an exclusion clause which excludes from coverage "injury to or destruction of (1) property owned, occupied or used by or rented to the insured * * *."

The trial court found that Turpin was an independent contractor and that he and his employees were not under the supervision or control and were not subject to the direction of Edwards in the performance of the work. It is this finding that is assailed by appellants as not being supported by the record.

In line with other courts, Oklahoma has held that an independent contractor "is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work."[1]

The difficulty, as always, comes when we apply the well established principle of law to a given set of facts. For that reason decided cases are of little help in resolving a given set of facts and no useful purpose would be served by analyzing the cases cited in the briefs of the parties, because none of them set out an identical factual situation.

While there are some statements in the record when taken out of context which tend to support appellant's contention, we think when the evidence is considered in its entirety it compels an affirmance of the trial court's finding and conclusion that Turpin was an independent contractor. All the testimony is that neither Edwards nor his agents

[1] *Producers' Lumber Co.* v. *Butler*, 209 Pac. 738; *Federal Mining and Smelting Co.* v. *Thomas*, 225 Pac. 967.

had any authority to direct the drilling operations. They could not tell Turpin's employees when to start, how to operate the equipment, or exercise any other direction or control over the manner in which the work was to be done. They did have the right to observe the drilling operations, tell the employees when to stop for purposes of testing the formation and could determine when drilling operations should cease, but this was all. This falls far short of exercising such supervision and control over the operations so as to place the equipment under the control of Edwards and make the workmen his agents and employees.

AFFIRMED.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1954.

No. 547

TRADERS AND GENERAL INSURANCE COMPANY, A CORPORATION, *Appellant,*

VERSUS

A. N. EDWARDS AND H. E. TURPIN, *Appellees.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Respondent, A. N. Edwards, desires to state briefly his grounds for objection to the granting of a writ of certiorari in this cause.

Statement.

Since the findings of fact and conclusions of law entered by the trial court were not included in the petition for certiorari, and since this decision rests largely upon the questions of fact in the case, we have appended to this brief as Exhibit "A," the findings and conclusions of the United States District Court for the Northern District of Oklahoma.

Reference to the findings of fact and conclusions of law discloses certain inaccuracies in petitioner's statement. The trial court found that Turpin contracted to drill an oil well into the pay sand. The trial court found that such operation was performed exclusively by Turpin and his men. The trial court found that respondent Edwards had no custody or control of the equipment used. The trial court specially found that the rig was not rented to Edwards.

In the light of the findings of the trial court which heard the evidence, the statements in the paragraph commencing at the bottom of page 8 of the petition for writ of certiorari and continuing on page 9 thereof, are not supported by the trial court's findings. The findings were specifically affirmed by the Court of Appeals.

Counsel states that the Court of Appeals did not pass on the meaning of the words "used by" and under the "control of" as used in the insurance contract. It should be noted that briefs of both parties in the appellate court referred to such language, and the petition for rehearing filed November 24, 1954, specifically referred to the words mentioned above.

Argument.

This case involves factual questions in the interpretation of a contract. The specific findings of the trial court and the affirmance thereof by the Court of Appeals are completely determinative of the issues.

Counsel's discussions of the casualty insurance business and of the Inland Marine Type Policy are irrelevant. Such irrelevancy exists because the court specifically found that the drilling rig involved was not owned, occupied, used by, or rented to the insured, respondent Edwards, and further that the rig was not in the care, custody or control of

Edwards. The judgment herein does not require petitioner to assume an obligation excluded from its contract. It finds to the contrary, that the factual conditions which would permit petitioner to avoid its general obligation to its insured do not exist.

Counsel appears to contend for the application of some esoteric meaning to the language of insurance policies, a meaning to be determined by the "science of Casualty Insurance Underwriting." It would be manifestly unjust to the millions of insurance policyholders to compel interpretation of their contracts by some standards known only to the underwriters who were preparing the contracts. We do not believe such to be the law in Oklahoma, where this policy was written, or in any other jurisdiction. The true principle is that the plain, ordinary and natural meaning of words control, and in the event of ambiguity or question, construction is to be most liberal in favor of the insured. *Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311, 48 S. Ct. 512, 72 L. ed. 895; *Ripley* v. *Railway Passengers Assurance Co.*, 83 U. S. 336, 21 L. ed. 469.

Applying the ordinary and normal meaning of the words used in the policy, the trial court found that the rig was not rented to, used by, or in the custody and control of Edwards. The Court of Appeals affirmed as it was bound to do. The opinion of the Court of Appeals is brief. It obviously does not discuss every item briefed by the parties. We do not conceive it to be the duty of an appellate court to comment on every argument of counsel in its opinion. All of the points of law on appeal were presented to the Court of Appeals, briefed and argued orally. The court reached the only possible conclusion on the evidence and the trial court's findings.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

G. Ellis Gable,
Beacon Building,
Tulsa, Oklahoma,

Attorney for Respondent, A. N. Edwards.

Of Counsel:

Jack N. Hays,
Beacon Building,
Tulsa, Oklahoma.

Exhibit "A."

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

—

No. 3372 - Civil.

—

A. N. EDWARDS, Plaintiff,

vs.

TRADERS AND GENERAL INSURANCE COMPANY, A CORPORATION, Defendant;

H. E. TURPIN, Intervenor.

—

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT.

1. This action was brought by plaintiff A. N. Edwards against defendant Traders and General Insurance Company under the Declaratory Judgment Act for the purpose of declaring the rights of the parties under a policy of insurance issued by such defendant to the plaintiff.

2. The policy was admitted to have been in force and effect on the 28th day of May, 1953, the material date in so far as this litigation is concerned.

3. On the 28th day of May, 1953, a drilling rig belonging to H. E. Turpin, intervenor herein, was burned while on plaintiff's Burgess lease in Okmulgee County, Oklahoma. Turpin filed an action in the District Court of Okmulgee County, Oklahoma, in cause No. 26710 alleging that his loss was due to the negligence of one Frank Gartner, admittedly an agent and employee of Edwards.

4. Edwards within an appropriate time demanded that the defendant insurance company defend the action

against him and accept the obligation to pay any judgment therein rendered. The defendant company refused.

5. The policy of insurance involved is a comprehensive general liability policy and contains an insuring clause covering plaintiff's liability for property damage in connection with his operations. The policy also contains the following exclusions as to property damage:

> "To injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured."

It is upon the basis of these exclusions that the defendant stated its refusal to defend.

6. There was an oral contract between plaintiff and intervenor Turpin whereby Turpin was to perform the operation of drilling into the pay sand in a well then being drilled. Plaintiff was to pay for such operation at the contract rate of $8.50 per hour and Turpin furnished his own rig, employees and supervision. At the time of the accident plaintiff and his employees were in control of the well on "day work" in that they told Turpin or his employees how much hole to make and when to stop for samples, looking at the sand and other tests. The rig, however, was actually operated at all times by Turpin's employees and no control of such machinery or the operation thereof was maintained by plaintiff or his representatives. Plaintiff and his representatives defined the jobs to be done, but the actual operation and manner and method of so doing was solely the responsibility of Turpin and his employees.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction of the parties and subject matter.

2. On May 28, 1953, the drilling rig herein concerned was not in the care, custody or control of plaintiff but was in the care, custody and control of its owner, H. E. Turpin, through his own employees at all times material herein.

3. No bailment or rental of such rig existed since it remained in the custody and possession of its owner, H. E. Turpin.

4. The rig in question was not "used" by plaintiff or his representatives at the time herein concerned but was at all times used by Turpin and his employees to accomplish the results prescribed by plaintiff and his representatives.

5. The defendant insurance company is obligated to defend plaintiff in cause No. 26710 now pending in Okmulgee County, Oklahoma, wherein H. E. Turpin is plaintiff and A. N. Edwards and Frank Gartner are defendants, and to pay all costs of defense and any judgment, settlement or compromise in connection therewith, and to defend and hold plaintiff harmless in connection with any other claims of liability made with respect to the loss or damage of such drilling rig and equipment on May 28, 1953, within the limits of the policy concerned.

Dated this 9th day of April, 1954.

ROYCE H. SAVAGE, District Judge.

Approved as to form:

Jack N. Hays, Attorney for Plaintiff;

A. M. Covington, Attorney for Defendant, Traders and General Insurance Company;

Hugh N. Sandlin,
Attorney for Intervenor, H. E. Turpin.